No. 20309

IN THE

United States Court of Appeals For the Ninth Circuit

OLA HENDRICKS and JANE DOE HENDRICKS, his wife, and THORLEIF PETERSEN and JANE DOE PETERSEN, his wife,
Appellants,

v.

OLAF ONA,
Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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STATEMENT OF PLEADINGS AND FACTS*

This is an appeal arising out of a libel *in personam.* Appellee is a fisherman. Appellants are owners of a fishing vessel and residents of the Western district of Washington. Appellee alleges in his libel that he entered into an oral contract with appellant Hendricks, the master of the vessel, to serve as a member of the crew, that appellants breached the contract and that appellee was thereby damaged (R. 1, 2). In their answer, appel-

Guide to Terminology and Abbreviations Used in this Brief. The abbreviation "R" is used to designate the page of the record of the pleadings, motions, judgment and similar documents. The abbreviation "Tr" is used to designate the page of the testimony and trial proceedings.

lants deny the contract and its breach by appellants and affirmatively allege a breach by appellee (R. 4, 5).

The contract as alleged was maritime in nature. 2 Am. Jur.2d, Sec. 61, p. 754. Hence, it comes within the original jurisdiction of the United States District Court for the Western district of Washington, 28 U.S.C. Sec. 1333.

The trial court found in favor of appellee and awarded judgment against appellants. The latter have appealed from the judgment. This court has jurisdiction of appeals from all final decisions of U. S. District Courts, 28 U.S.C. Sec. 591.

CONCISE STATEMENT OF THE CASE

Geographical

The three places involved are Seattle, Kodiak and Adak. Kodiak is a large island off the south coast of Alaska. Adak is a small island at the center of the Aleutian chain. A navy base is located at Adak, and for a fisherman to get to that island by plane involves considerable red tape (Tr. 374).

The Contract

Appellants are joint owners of the fishing vessel *Sea Star*. Appellant Hendricks was master of the vessel during most of the period in question. Appellant Petersen is a Seattle business man. The crew is hired by the master on a share or "chance" basis (Tr. 22).

Appellee, a fisherman, was 63 years old when he and

appellant Hendricks had an oral conversation in the late spring of 1963 (Tr. 64). There is a conflict in the testimony as to what was said, but the trial court resolved this conflict by making certain findings with which no issue is taken here. It found that these two parties made an oral contract under the terms of which appellee was to join the vessel in Alaskan waters in August of 1963 and to receive as a compensation for his services a full share of the catch in accordance with the custom in the crab fishing industry (Finding V, R. 33). He was to be employed as a seaman and fisherman for the "coming crab fishing season" (Finding IV, R. 33).

At the time of this oral conversation the vessel was in Seattle. It was scheduled to and, in fact, did depart for Alaskan waters late in June (Tr. 30). The reason that appellee did not depart with the vessel was that under the terms of the oral contract he was to be a replacement for another crew member, Dennis Petersen. The latter was scheduled to leave the vessel in August, and appellee was to fly to Alaska to join the vessel then (Tr. 8, 76). Appellant Hendricks told appellee that he would be notified by appellant Petersen as to when to go to Alaska to join the vessel (Tr. 81).

There was no express agreement as to how much notice appellee was to be given (Finding VIII, R. 33), nor was there any testimony as to a discussion of the means of communication between appellant Hendricks on the boat and appellant Petersen in Seattle.

Appellee placed his sea bag aboard the vessel in Seattle,

pursuant to what the trial court found to be a directive by appellant Hendricks (Finding VII, R. 33, 34) and waited in Seattle to receive notice from Petersen to fly to Alaska.

Dennis Petersen, the man who was to be replaced by appellee, is the son of appellant Petersen (Tr. 256).

Nature of the Fishing Operation

Crab fishing in Alaskan waters is done by the use of crab pots. These wooden pots are prepared in Seattle and stacked on the vessel's deck and taken north. They are placed overboard with ropes and buoys attached and routinely hauled in with the use of a power winch (Tr. 164). As they come in, the ropes are coiled and the pots are stacked on deck. The latter operation requires that the fishermen climb on top of the pots (Tr. 168).

Vessels such as the *Sea Star* operate with mother vessels. The function of the mother ship is to receive and process the crabs (Tr. 359). It remains in a certain place for awhile and then issues oral orders to the masters of the crab fishing vessels to the effect that the whole operation will move elsewhere (Tr. 360, 361).

Notice to Appellee

For a while the mother ship in question was in Moshier Bay at Kodiak Island. Appellant Hendricks received orders from its master to proceed to Adak (Tr. 362). On that same day appellant Hendricks observed Dennis Petersen writing a letter to his father. He

instructed the young man to include in the letter the following message:

> That Petersen was to contact appellee and see if he was available to come to Alaska by the following Monday to join the vessel because orders had been received to proceed to Adak; that if appellee was not available, Petersen was to contact and offer the job to one Arne Haugen. (Tr. 366)

Young Petersen included the message in the letter. It was mailed that same morning (Tr. 367, 368). Once or twice each day a plane picks up mail from the mother ship (Tr. 367). It takes one or two days for an airmail letter to get from Moshier Bay to Seattle (Tr. 367).

There was testimony as to other possible methods of sending the message, namely, direct radio or radio telephone. Appellant Hendricks testified that it was practically impossible to communicate by direct radio from the boat (Tr. 369). A radio telephone was located in a cannery at Moshier Bay. However, it is very difficult for an outsider to make a call on it (Tr. 373).

The letter arrived at appellant Petersen's home in Seattle on the morning of Saturday, August 10. Petersen was at his office and received a phone call from his wife advising him of its contents (Tr. 307, 308).

Between nine and ten o'clock that morning, Petersen called appellee and told him that he was expected to join the vessel on Kodiak Island the following Monday (Finding IX, R. 34).

There is a conflict in the testimony as to what appellee said in response to this directive. The conflict is re-

solved by the court's finding that appellee informed Petersen that he was willing to join the vessel later in the following week (Finding XI, R. 34). On the basis of this response, appellant Petersen proceeded to hire Arne Haugen for the job. Later in the day he advised appellee's wife that appellee was not to join the vessel (Finding XII, R. 34, Tr. 329-331).

When appellant Hendricks sent the message to Petersen, he was not familiar with the then existing flight schedules between Seattle and Kodiak, although he had had experience in leaving Seattle on Sunday and arriving on Kodiak on Monday (Tr. 390). He knew he was under orders to leave for Adak the following Monday (Tr. 393). For a man to fly from Seattle to Adak would have involved much red tape and extra expense (Tr. 374).

In fact, there was no flight by which a man could arrive in Kodiak on Monday (Ex. A5).

There is some conflict in the testimony between Petersen and Haugen as to Haugen's response to the directive that he be in Kodiak by Monday. Haugen states that he told Petersen that he couldn't arrive till Tuesday (Tr. 196). Petersen does not recall this.

Appellants pleaded that the notice given was in accordance with the custom of the fishing industry (R. 26). Several fishermen testified as to this custom. Appellant Hendricks stated that in his opinion a man waiting on call for a job should be ready to be up there in twenty-four hours or less (Tr. 376). Other witnesses testified

to the same effect (Tr. 160, 198). Appellee did not present testimony to the contrary.

The trial court, however, found that the notice given to appellee "was improper, untimely and unreasonably short under the circumstances' (Finding X, R. 34). On the basis of this finding, the trial court went on to find (1) that in telling Petersen that he was willing to join the vessel later in the following week, appellee acted reasonably (Finding XI, R. 34) and (2) that in not providing appellee with the job, appellants breached their contract (Finding XII, R. 34).

Appellants take issue with these findings.

Damages

The replacement fisherman, Haugen, joined the vessel and it departed immediately for Adak (Tr. 198).

At the end of October or the first of November, appellant Hendricks left the vessel and one Magne Ness replaced him as master. Ness hired two more crew members (Tr. 162). Haugen remained on the vessel as a member of the crew until the end of the crab season in December of that year when the vessel returned to Seattle. Haugen returned to work on the vessel for most of the crab fishing season in the spring of 1964.

In fixing damages, the trial court used the earnings of Haugen through the spring of 1964 and subtracted therefrom the sums which appellee earned elsewhere in the meantime (Conclusion II, R. 35).

There are two cut-off points with which we are concerned on this appeal.

The first cut-off point is the point at which Ness took over as master. It is customary for the master to discharge a man who isn't performing his work satisfactorily (Tr. 163). Ness testified that he had worked with appellee in connection with getting the crab pots ready for the trip. Appellee's work was slow. Ness prepared about thirteen pots while appellee prepared about seven (Tr. 163). Ness further testified that, in his opinion, appellee could not have stacked the pots on deck in the course of fishing operations (Tr. 167). This is one of the principal jobs performed aboard the vessel (Tr. 167, 168). The same witness also testified that, if appellee had joined the vessel in Alaska and had not been able to stack pots, the witness would have fired appellee when he took over as master (Tr. 187). The witness expressed the opinion that he would not have kept plaintiff as a member of the crew, as plaintiff was too old for the job (Tr. 43, 44).

Moreover, autumn fishing work is a lot harder than summer fishing work. The rough waters encountered in the latter season make it more difficult for the crew to handle the empty pots (Tr. 378).

Appellee obtained employment on another vessel some time after his telephone conversation with Petersen. This was employment in the pilot house rather than on deck (Tr. 142).

Appellants contend that the court in assessing damages

should have determined that appellee would not have remained on the vessel after Ness took over as master.

The second cut-off point is the end of the crab fishing season in December. The trial court's finding was that appellee was hired for "the coming crab fishing season" (Finding IV, R. 33).

There was considerable testimony as to what constituted the "season." Ness testified that the season is considered to be over when the vessel returns to Seattle and that another season starts when the vessel goes north the following February (Tr. 180, 181). Another witness testified that the season runs from summer till December (Tr. 317).

No witness testified that the crab fishing season runs from the beginning of summer through the following spring.

The pre-trial order recites among the admitted facts that the 1963 crab fishing season of the *Sea Star* lasted from June 22, 1963, to December 10, 1963 (R. 22).

All witnesses who testified on this subject concurred in their view that, once a fisherman is hired, he may remain on the vessel for several seasons. His oral contract is renewed each time. Thus, if a man is hired in the early summer and does a reasonably good job, he is likely to be rehired for the following spring season (Tr. 23).

The trial court allowed appellee damages on the basis

that, once aboard, he would have continued to work on the vessel through the spring crab season in 1964, as Haugen, in fact, did. Appellants contend that the trial court applied the wrong rule of law in this regard. "Wages to the end of the season" should be interpreted to mean wages to the end of the season for which the fisherman is hired.

Post-Trial Motions Following the Trial

Appellants made timely motions to dismiss the cause or, in the alternative, to reduce the award by allowing damages only for (1) the period until Ness took over as master, or (2) the season ending in December, 1963, or, in the alternative, for a new trial. These motions were all denied and judgment was entered against the appellants in the amount of $13,127.22. This appeal follows.

SPECIFICATIONS OF ERROR

1. Finding VIII is erroneous in the words "but it is reasonably implied that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island" because it is not supported by the evidence.

2. Finding X is in error in its entirety, namely "that the notice given by respondent Petersen was improper, untimely and unreasonably short under the circumstances" because it is not supported by the evidence.

3. Finding XI is in error in the words "that at all times material herein, libelant was ready, willing and able to perform his contractural obligation in accordance

with the aforesaid contract to serve in the crew of the F.V. *Sea Star*" because the same is contrary to the uncontradicted evidence of custom.

4. Finding XII is erroneous in its entirety, namely,

> ". . . that later, on August 10, 1963, without good cause, or notice, respondent Petersen wrongfully and unlawfully breached the aforesaid contract by advising libelant's wife that libelant's services were not wanted and that he should not join said vessel."

for the reason that sufficient notice was in fact given to libelant.

5. Conclusion of Law I is erroneous because it is based upon erroneous findings and because of an anticipatory breach by appellee.

6. Finding XIII is not supported by the evidence in that the evidence preponderates to the effect that appellee would not have remained on the vessel after Ness assumed command.

7. Conclusions of Law II and III are contrary to law in that damages were improperly assessed. There is no evidence from which the court could find with reasonable certainty that appellee would have remained on the vessel after Ness took over command.

8. In the alternative to Specification 7, damages were improperly assessed in that the season for which appellee was hired ended in December, 1963.

9. The trial court erred in denying appellants' post trial motions to dismiss the cause or to reduce the awards in accordance with the contentions set forth in Specifications 7 and 8 above, or for a new trial.

ARGUMENT

Specifications 1 to 4

Specification 1

"Finding VIII is erroneous in the words 'but it is reasonably implied that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island' because it is not supported by the evidence."

Specification 2

"Finding X is in error in its entirety, namely 'that the notice given by respondent Petersen was improper, untimely and unreasonably short under the circumstances' because it is not supported by the evidence."

Specification 3

"Finding XI is in error in the words 'that at all times material herein, libelant was ready, willing and able to perform his contractural obligation in accordance with the aforesaid contract to serve in the crew of the F.V. *Sea Star*' because the same is contrary to the uncontradicted evidence of custom."

Specification 4

"Finding XII is erroneous in its entirety, namely 'that later, on August 10, 1963, without good cause, or notice, respondent Petersen wrongfully and unlawfully breached the aforesaid contract by advising libelant's wife that libelant's services were not wanted and that he should not join the said vessel' for the reason that sufficient notice had in fact been given to libelant."

Outline of Argument

(A) Introductory

(B) Applicable Law

1. Scope of Review of Admiralty Case

2. Review on Non-Conflicting Evidence

(C) Testimony as to Custom

(D) Testimony as to Alternative Means of Communication

(E) Promptness With Which Message Was Sent

(F) Conflicting Testimony as to the Date the Letter Was Mailed

(G) Monday v. Tuesday.

(A) Introductory

The first four specifications all involve findings of fact. They are considered together in argument because they all involve the same issue. The findings are as follows:

> "Finding VIII. There was no express agreement as to how much notice in point of time would be given by respondents to libelant respecting the beginning fishing work date, but it is reasonably implied by the parties that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island, Alaska, to replace Dennis Petersen, respondent Thorlief Petersen's son, when Dennis Petersen returned to Seattle in August, 1963." (R. 33, 34)
>
> "Finding X. That the notice given by respondent Petersen was improper, untimely and unreasonably short under the circumstances." (R. 34)
>
> "Finding XI. That at all times material herein, libelant was ready, willing and able to perform his contractual obligation in accordance with the aforesaid contract to serve in the crew of the F.V. *Sea Star* and that libelant so informed respondent Petersen in their telephone conversation on August 10, 1963, and that libelant was willing to join the vessel

later in the following week which would have been reasonable." (R. 34)

"Finding XII. That later, on August 10, 1963, without good cause, or notice, respondent Petersen wrongfully and unlawfully breached the aforesaid contract by advising libelant's wife that libelant's services were not wanted and that he should not join the vessel." (R. 34)

The issue in question is notice. Each of these findings directly involves this question. In Finding VIII, the trial court found an unspoken implication as to notice. In Finding X, it found that the notice which was actually given was unreasonable. In Finding XI, it found that appellee was entitled to sufficient notice so that he did not breach his contract when he said that he was not willing to join the vessel until later in the following week. In Finding XII, it found that appellant Petersen, in telling appellee that his contract was cancelled (because he would not join the vessel until later in the week), acted without good cause.

It would be a waste of space in this brief to consider each of these findings separately.

The evidence bearing on the subject of notice is essentially non-conflicting. It consists of (a) testimony as to custom with regard to notice and (b) testimony as to the alternative means by which Hendricks might have communicated with Petersen.

(B) Applicable Law

1. Scope of Review of Admiralty Case

In reviewing a judgment of a trial court sitting without

a jury in admiralty, a court of appeals may not set aside the judgment below unless it is clearly erroneous. A finding is purely erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *McAllister v. United States,* 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 3.

> "It is now settled beyond all question that appeals in admiralty are not trials *de novo,* and that our scope of review is no broader than that of factual contentions in non-admiralty cases tried to a district court without a jury. The District Court's findings are binding upon us unless clearly erroneous. While we cannot say that the conflicting evidence would not have supported contrary findings, it was for the District Court to resolve the conflicting evidence on the subsidiary factual questions and, since the findings which he actually made are supported very substantially, we cannot disregard them." *U.S. v. S.S. Soya Atlantic,* (CA 4th 1964) 330 F.2d 732, 735.

2. Review on Non-Conflicting Evidence

It is significant to note that the portion of *U.S. v. S.S. Soya Atlantic,* quoted immediately *supra,* refers to "the conflicting evidence."

From the standpoint of a reviewing court, there is a basic difference between a finding of fact resting upon a conflicting evidence and a finding of fact resting upon non-conflicting evidence.

> "A finding of the trial judge which rests on conclusions drawn from undisputed facts or nonconflicting evidence generally does not carry the same weight on appeal as a finding resting on disputed

fact or conflicting evidence, but may be treated on appeal as if it were a legal conclusion, subject to the principle that where a point of law is concerned, the appellant court is not committed by the view taken by the court below. It has similarly been said that where uncontradicted evidence admits only of one conclusion, a finding contrary thereto cannot stand on appeal." 5 Am. Jur. 2d § 845, pp. 288, 289; *Strong v. United States,* (CA 1 1931) 46 F.2d 257.

(C) Testimony as to Custom

This case deals with a specialized industry. Appellants pleaded that the notice given was in accordance with the custom of this industry (R. 26). Testimony on this subject was properly admitted.

Appellant Hendricks stated that, in his opinion, a man in Seattle waiting on call for a job should be ready to be in Kodiak within 24 hours or less (Tr. 376). The witness Ness testified:

> "Well, my opinion is that if a guy is given a notice, he has to come right there and then; if he can't—if he can't be there, I mean within such a time limit, why you have got to look for somebody else." (Tr. 160)

The witness Haugen testified as follows:

"Q. Now, Mr. Haugen, have you observed any custom in the fishing industry with respect to how much notice a fisherman is given by a master before he is to join the ship?

"A. No. If you are waiting for a job, you have to be prepared to be there when they want you.

"Q. This is your observation of the custom, is that right?

"A. Yes. Yes." (Tr. 198, 199)

There was no evidence to the contrary.

It is undisputed, therefore, that a fisherman hired to stand by for orders to go north is supposed to be ready to go at once. Finding VIII that "it is reasonably implied by the parties that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island" (R. 33, 34) is not supported by the evidence.

(D) Testimony as to Alternative Means of Communication

Appellant Hendricks received his instructions from another ship to proceed to Adak. In order to avoid the extra expense and red tape of having Dennis Petersen replaced at Adak, he undertook to arrange for the replacement at Kodiak. The means of communication which he selected was the mail. He testified that in his experience it takes one or two days for an airmail letter to get from Moshier Bay to Seattle (Tr. 367).

He could have attempted to send the message by radio from his vessel. He testified as to why he did not.

"Q. Now, have you had experience in Alaskan waters with attempts to reach Seattle with the radio on the *Sea Star*?

"A. Yes, I have.

"Q. Had you made attempts to reach Seattle from Alaskan waters at any time prior to the day on which this letter went out?

"A. Yes.

"Q. And will you tell us, generally, what success you had in your attempts to use the radio?

"A. We had—I have never had any success.

"Q. What troubles have you run into?

"A. The only—the only way that we can call Seattle is through the marine operator in Seattle. It is called KOW, that is their station. And, due to all the local interference around there, it is just—pretty near impossible to get through from Alaska. I have never been able to make one call since I have owned and operated the *Sea Star*. I have tried on many, many occasions, but not once have I got through." (Tr. 369)

There is no testimony to the contrary.

He could also have attempted to send a message by means of a radio telephone located in a cannery at Moshier Bay. In fact, a telegram was sent to Hendricks by appellee after appellee was told by Petersen that he was not to join the vessel. This telegram was received through the radio telephone at the cannery (Tr. 371). When it was received, Hendricks went ashore and used this radio telephone to call Petersen and discuss the matter (Tr. 371, 372).

The difficulties incident to the use of this radio telephone were related by Hendricks in connection with his call to Petersen. It involved taking an hour-long trip across the bay in a 10-foot fiberglass skiff. Hendricks described it as follows:

> "It is dangerous business to go out in a little skiff like we have there on Moshier Bay, in any condition." (Tr. 372)

This testimony is not contradicted.

The mechanics of making the call itself were also described by Hendricks.

"Q. And what kind of a speaking device was there for this call?

'A. It is by radio. The only way that the cannery themselves can make a call, as in this instance, ask them; they have a schedule twice a day: one in the morning, and one at night, that they have a schedule with the operator at Kodiak. And they have—then, whatever messages they have to send out, will be sent on this time, and then they are through until the next schedule. And they are, during this time of the year, they are so busy that they, in order for us to come in there, well, they don't like to do it. That's why it is very difficult to—to make a 'phone through that cannery.

"Q. Now, how long did it take you from the time you got in to the cannery to—before you got the call through to Mr. Petersen, on that occasion?

"A. Well, we had to wait an hour, until the schedule time was on; just about an hour we had to wait until their turn was to be on the schedule." (Tr. 373, 374)

This testimony is uncontradicted.

(E) Promptness with which Message Was Sent

Hendricks testified that Dennis Petersen's letter was sent the very same day that Hendricks received instructions from the mother ship that he would be proceeding to Adak (Tr. 362). He testified further as follows:

"A. If I had a month's notice myself, I would have given him a month's notice.

"I notified Olaf the minute I got my notice myself, and that is the best I could do under the circumstances." (Tr. 386)

This testimony is also uncontradicted.

(F) Conflicting Testimony as to the Date the Letter Was Mailed

The only conflict in the evidence on the issue of notice is in the testimony as to the day the letter was mailed. (The letter itself was thrown away by Petersen (Tr. 61) and therefore only secondary evidence as to its contents was admitted.)

Hendricks testified that the letter was mailed Thursday (Tr. 387). Dennis Petersen said it was mailed Monday, Tuesday or Wednesday (Tr. 270). The trial court did not make a specific finding as to when it was mailed. However, in defending Finding X, appellee will undoubtedly argue from this testimony by young Petersen.

There is some significance as to when the letter was mailed. It arrived in Seattle Saturday. If it was mailed on Thursday, as Hendricks said it was, it was an appropriate method of communication. If it was mailed earlier in the week, it would appear to be a less appropriate method.

There is a strong preponderance of evidence in favor of the letter's having been mailed on Thursday. Here are the reasons:

1. Hendricks was in a much better position to recall the date of the letter than Dennis Petersen. The message which Hendricks arranged to have included was a business message of some importance. From Dennis Petersen's standpoint, on the other hand, this was just a personal or family type letter (Tr. 261).

2. Hendricks' testimony on the subject was clear. He said:

"I think it was sent on Thursday." (Tr. 387)

Dennis Petersen's testimony, on the other hand, was relatively vague. He did not pinpoint a specific day. He places it somewhere within a three-day period. Moreover, these three days were suggested on cross-examination.

"Q. Do you know—did you write that letter to your dad on Tuesday or Wednesday of the preceding week?"

(Colloquy)

"One week before Mr. Haugan joined the vessel; is that about when you wrote the letter?

"A. Approximately.

"Q. And would it certainly have been either Tuesday or Wednesday—Monday, Tuesday or Wednesday, that you wrote that letter?

"I mean, would it have had to have been one of those three days?

"A. Yes." (Tr. 269, 270)

3. A Thursday mailing is consistent with the usual mail schedule. A plane picks up mail from the mother ship in Moshier Bay once or twice each day (Tr. 367). It takes one or two days for an airmail letter to get from Moshier Bay to Seattle (Tr. 367).

(G) Monday v. Tuesday

It is anticipated that appellee will place considerable emphasis on the fact that Petersen directed him to be at Moshier Bay Monday, when, in fact, that was impossible.

Haugen did not arrive until Tuesday. From this appellee will argue that appellants impose a condition which was impossible of performance.

At the time Hendricks sent the message to Petersen, he was not fully acquainted with the then existing commercial flight schedules between Seattle and Kodiak (Tr. 390). He had had experience with these flights in the past. He testified as follows:

> ". . . I specified Monday. I—I used to go up there; I used to go up to Anchorage, from Anchorage to Kodiak. I have left Sunday from Seattle, going to Anchorage, and got to Kodiak on Monday. I have, myself, a number of occasions." (Tr. 390)

When Petersen talked to appellee on the phone on Saturday morning, the subject of flight schedules did not come up. Petersen simply told appellee that he was to proceed to Kodiak and get there by Monday (Tr. 309). Appellee answered in these words:

> "I have some business to take care of, and I can't be up there before the later part of the week." (Tr. 309).

Appellants submit that the ordinary meaning of the words, "the later part of the week," is Thursday or Friday—perhaps Wednesday at the earliest.

Specification 5

Conclusion of Law I is erroneous because it is based upon erroneous findings and because of an anticipatory breach by appellee.

Outline of Argument

(A) Introduction

(B) Conclusion II is based upon erroneous findings

(C) Anticipatory breach

(D) The libel should have been dismissed

(A) Introduction

Conclusion of Law I is as follows:

> "That the notice to join the vessel given to libelant by respondent Petersen on August 10, 1963, was untimely, unreasonable and improper and that, notwithstanding libelant's acknowledged willingness to join said vessel later in the following week, which would have been reasonable, respondent Petersen wrongfully repudiated the aforesaid contract of employment later on the same date." (R. 35)

It is actually a repetition of Findings VII, X, XI and XII.

(B) Conclusion II Is Based upon Erroneous Findings

In the previous section of this brief, appellants have set forth reasons why these four findings are erroneous.* Those reasons are incorporated here again by reference.

(C) Anticipatory Breach

The only portion of this conclusion that amounts to more than a pure finding of fact is that portion reading

> ". . . respondent Petersen wrongfully repudiated the aforesaid contract of employment later on the same date."

This portion is itself a repetition of Finding XII.

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*See argument on Specifications 1-4.

It might be classed as a mixed question of law and fact. The facts were all discussed in the previous section of this brief, namely, that (1) the notice given by Petersen to appellee was within the custom of the industry, (2) that Hendricks' selection of the means of communication was reasonable under the circumstances, (3) that the stated condition that appellee arrive by Monday was made without knowledge of the then existing ariline schedules and on the basis of Hendricks' previous experiences therewith, and (4) that airline schedules were not referred to in the conversation between Petersen and appellee.

If appelle had said that he couldn't arrive at Kodiak Island until Tuesday because of the airline schedules, this court would be faced with a very different situation. Appellants would have imposed a condition which was impossible of performance, and appellee would have failed to comply becauseof this impossibility.

Here, however, appellee stated that he would not comply because he had other business to attend to (Tr. 309).

Under the undisputed evidence appellants had the right to require that appellee arrive at Kodiak Island by Tuesday. This was entirely possible of performance and was in fact performed by Haugen (Tr. 197, 201). Appellee's statement that he would not comply with this condition constituted an anticipatory breach of the contract.

Under the undisputed evidence, this was an important

condition. *Hendricks had orders to leave Kodiak on Monday* (Tr. 393). He had to wait one day for Haugen because of the flight schedules. If he had had to wait until later in the week, it would have been seriously detrimental to the fishing operation (Tr. 160).

Where a party to a contract states that he will not comply with an important condition, that constitutes an anticipatory breach of the contract. *Palmiero v. Spada Distributing Co.*, (CA 9 1954) 217 F.2d 561, is a case which considered the Washington State Law on anticipatory breach. The opinion at page 566 quoted from 12 Am. Jur., "Contracts," § 393, as follows:

> "In order to justify the adverse party in treating the renunciation as a total breach, the refusal to perform must be of the whole contract *or of a covenant going to the whole consideration*, and it must be distinct, unequivocal and absolute." (Emphasis supplied)

The same opinion refers to the case of *Walker v. Herke*, 20 Wn.2d 239, 147 P.2d 255. That case in turn holds that where one party has repudiated an executory contract, the adverse party has an election to treat the contract as broken or not.

Clearly, under the undisputed evidence, appellants' right to require that appellee arrive at Kodiak by Tuesday amounted to "a covenant going to the whole consideration." When appellee stated to Petersen that he would not comply with this condition, Petersen had the right to elect to treat the contract as broken. He did so

when he stated to appellee's wife later that day that appellee was not to join the vessel.

(D) The Libel Should Have Been Dismissed

Since Petersen acted within his rights when he elected to treat the contract as broken, the trial court should have dismissed the libel.

Specification 6

Finding XIII is not supported by the evidence in that the evidence preponderates to the effect that appellee would not have remained on the vessel after Ness assumed command.

Outline of Argument

(A) Introductory

(B) Age

(C) Health

(D) Ability

(E) Summer v. Autumn Fishing

(F) Ness' Opinion Testimony

(G) Appellee's Actual Employment

(H) Basis of Trial Court's Fnding

(I) Evidence as to Haugen's earnings until Ness assumed command.

(A) Introductory

Finding XIII is as follows:

"That also on August 10, 1963, Arne Haugen was

hired by respondents in libelant's place as a member of the crew in the F.V. *Sea Star* and that libelant's earnings in the crew of said vessel would have been at least equal to those of Arne Haugen during the fall of 1963 and spring of 1964." (R. 34)

This specification of error is not of controlling importance in this appeal. The trial court applied the wrong law of damages in Conclusions II and II, as shall be shown in our arguments on Specifications 7 and 8. In those arguments appellants shall contend that, even if this court determines that Finding XIII is supported by the evidence, the damage award is incorrect and should be reduced.

The evidence discussed under this specification is germane to Specification 7 below and will be incorporated by reference in that argument.

(B) Age

Appellee was 63 years old when he and appellant Hendricks had an oral conversation in the late spring of 1963 (Tr. 64).

(C) Health

On December 10, 1962, a portion of appellee's stomach was surgically removed. Drainage was accomplished through a tube which was removed from appellee on January 11, 1963. He left the U. S. Public Health Hospital four days later (Tr. 404, 405). It is noteworthy that after this suit was commenced appellee went to that hospital and sought to have a "fit for duty" slip

issued to him, dating retroactively back to February, 1963. The hospital refused, as there was no record that he was ever made fit for duty (Tr. 405).

(D) Ability

Ness testified that he and appellee had worked together in connection with getting the crab pots ready for the trip (Appellee was paid specially for this work by appellant Petersen because appellant's son, Dennis Petersen, was unable to perform his share of the preliminary work (Tr. 47, 48)). Appellee's work was slow. Ness testified that he prepared about 13 pots while appellee prepared about 7 (Tr. 153).

(E) Summer v. Autumn Fishing

The 1963 crab fishing operation of the *Sea Star* lasted until December 10, 1963 (R. 22). Appellant Hendricks testified to the difference between a fisherman's work in the summer and that which is performed in the fall.

"Q. Do you have an opinion as to whether there is any difference between the degree of physical strength of a crewman required for summer fishing and that required for November fishing?

"A. Yes, I would say so.

"Q. And would you describe the difference?

"A. Well, we will take these crabpots that we were handling. The empty crabpots themselves weigh, well, approximately three, four hundred pounds. That is empty. We have had up to 2,000 pounds of crabs, live crabs in them, besides that, and in rough seas, where two men, they have got to balance these here, that is quite heavy. That, and in rough—

"Q. What is the connection between that and the degree of physical strength needed?

"A. Well, it takes physical strength to do that." (Tr. 378).

(F) Ness' Opinion Testimony

One of the principal jobs performed aboard the vessel is that of stacking the crab pots on the vessel's deck (Tr. 167, 168) and on some days the crew spends as much as four or five hours on that task. Ness testified that, in his opinion, appellee could not have handled the stacking of pots (Tr. 167). That witness answered a hypothetical question as follows:

"Q. Assume that Mr. Ona had joined the vessel in Alaska, and assume that it developed that he could not participate in the stacking of the crab pots, when you became master, in October, would you have kept him on as a member of the crew?

"A. No, I don't think so.

"Q. Why not?

"A. Because that is one of the most important parts in the crab fishing is to stack gear, and to move gear. If he wouldn't have been able to stack the gear, well—well, he wouldn't—then we had to do it for him, or somebody else had to do it for him, that is the way it works, anyway." (Tr. 187)

He expressed the opinion that when he took over as master of the vessel, he would not have kept appellee as a crew member because he thought that appellee was "too old for the job" (Tr. 43, 44).

(G) Appellee's Actual Employment

Appellee worked on another vessel that same season.

It was the *Chelsea*. His function on that vessel was one which he performed in the pilot house (Tr. 142).

(H) Basis of Trial Court's Finding

In arriving at Finding XIII, the trial court relied on the testimony of appellants themselves and certain of the witnesses to the effect that appellee would probably have lasted on the vessel through the 1964 spring fishing season if the quality of his work was satisfactory. In each instance the witness based his opinion on the express assumption that the quality of appellee's work was satisfactory (Tr. 23, 24, 42, 43, 189, 208, 254, 255). It is submitted that there is not evidence in the records to support a finding to the effect that appellee's work would have been sufficiently satisfactory for Ness to have decided to keep him on board during the late part of the season.

Specification 7

Conclusions of Law II and III are contrary to law in that damages were improperly assessed. There is no evidence from which the court could find with reasonable certainty that appellee would have remained on the vessel after Ness took over command.

Outline of Argument

(A) Introductory

(B) If Ordinary Contract Damages Are Applicable to This Case, the Amount of Damages Must Be Established With Reasonable Certainty

(C) There Is No Evidence From Which the Trial Court Could With Reasonable Certainty Find

That Appellee Would Have Remained on the Vessel After Ness Took Over Command.

(D) Evidence as to Haugen's Earnings Until Ness Assumed Command

(A) Introductory

The trial court made Finding XIII (that appellee's earnings would have been at least equal to those of Haugen through the spring of 1964). Then it went on to make Conclusion of Law II as follows:

> "That, as a direct and proximate result of respondents' breach and repudiation of the aforesaid contract, libelant sustained damages by way of lost earnings in the sum of $13,127.22." (R. 35)

and then made Conclusion of Law III as follows:

> "That libelant is entitled to a judgment against respondents in the sum of $13,127.22, plus costs." (R. 35)

The trial court was wrong in making Finding XIII for the reasons set forth in Specification 6 above. Nevertheless, even if there was substantial evidence to support that finding, such evidence would not of itself be sufficient to support these two conclusions.

(B) If Ordinary Contract Damages Are Applicable to This Case, the Amount of Damages Must Be Established With Reasonable Certainty

In this specification, we shall consider the question from the standpoint of ordinary contract damages. This appears to have been the basis of the trial court's award of damages.*

*In the next specification, we shall point out that ordinary contract damages is the wrong measure of damages where a seaman is improperly discharged.

It is appellee's obligation to prove damages for breach of contract with sufficient certainty so as to render the award free from speculation or conjecture. In the case of *Pappas v. Zerwoodis,* 21 Wn.2d 725, 153 P.2d 170 (1944), a case involving an attempt to collect loss of profits from breach of lease, the court said at page 174:

> "On the other hand, where special damages, such as loss of profits, are specifically set forth and proved, the recovery by a tenant for breach of his landlord's covenant to repair or other covenant with respect to the use of property is not restricted to the difference in rental value, as expressed in the foregoing general rule, but may also include such loss of profits as has been directly and necessarily caused by the landlord's wrongful act or default. In such case, however, *the loss must be shown with a reasonable degree of certainty and accuracy, and the proof establishing the loss must be clear and convincing, free from speculation or conjecture.* These complementary statements express a rule to which this court is definitely committed." (Emphasis supplied)

In *Keesling v. Seattle,* 52 Wn.2d 247, 324 P.2d 806, the court stated at page 254:

> "Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount."

(C) There Is No Evidence From Which the Trial Court Could With Reasonable Certainty Find That Appellee Would Have Remained on the Vessel After Ness Took Over Command

Appellee was a relatively old man. While the vessel

was outfitting in Seattle, his work on the crab pots was relatively slow. Ness took over the command of the vessel at the end of October (Tr. 162). He testified that (1) he did not think appellee could stack crab pots at sea (Tr. 167) and (2) if appellee had joined the vessel in Alaska and could not stack pots at sea, he, Ness, would have fired him when he took over as master. The late fall season requires much more arduous work than the summer season (Tr. 378). Appellee obtained another job that season where he worked in the pilot house (Tr. 142).

Hypothetical questions were placed by appellee's counsel to appellants and several other witnesses. All testified that appellee would probably have remained on the vessel through the spring season of 1964 if his work was satisfactory (Tr. 23, 24, 42, 43, 189, 208, 254, 255). The record is barren of evidence that his work—particularly in the late autumn—would have been satisfactory. Finding of Fact XIII is therefore not supported by the evidence.

A fortiori the trial court could not conclude "with reasonable certainty" that appellee was entitled to damages based on Haugen's work on the vessel beyond the time that Hendricks left it as master.

(D) Evidence as to Haugen's Earnings Until Ness Assumed Command

Exhibit A5 is the settlement sheet showing the earnings of crew members up to the time that Ness replaced Hendricks as skipper of the vessel (Tr. 381). According

to that sheet, Haugen received the sum of $6,960.47. During the same period, appellee actually earned the sum of $1,644.31 on another vessel. That vessel completed its fishing on October 14, 1963 (Tr. 89), well in advance of when Ness replaced Hendricks as skipper (Tr. 162). Subtracting this sum from Haugen's earnings leaves a difference of $5,316.16.

Since the trial court could not conclude with reasonable certainty that appellee would have remained on the vessel after Hendricks left it as master, the damage award (if there was to be a damage award at all) should have been $5,316.16.

Specification 8

In the alternative to Specification 7, damages were improperly assessed in that the season for which appellee was hired ended in December, 1963.

Outline of Argument

(A) A special rule of substantive law applies to damages for the wrongful discharge of a seaman.

(B) That measure of damages is the same as with a seaman who takes ill on a voyage.

(C) The case authorities define "season" and "voyage" on the basis of the period for which the seaman is hired.

(D) There is no evidence that appellee was hired for more than for the 1963 crab fishing season.

(E) Evidence as to Haugen's earnings in 1963 season.

(A) A Special Rule of Substantive Law Applies to Damages for the Wrongful Discharge of a Seaman

In Conclusion II the trial court determined that as a proximate cause of appellants' breach of contract, appellee sustained damages by way of lost earnings in the sum of money equal to what Haugen earned on the *Sea Star* through the spring of 1964, less what appellee in fact earned during said period.

In so doing, the trial court ignored the rule of substantive law which was urged in argument by appellants. Stated simply, the rule is that a seaman who is wrongfully discharged is entitled to wages to the end of the voyage or season for which he is employed. Where he is wrongfully discharged in a port other than a port of shipment, he is also awarded the expenses of his layover and return.

> "The cases subsequent to *Emerson v. Howland,* (CC Mass. 1816), appear to have followed both rules, some allowing *wages to the end of the voyage* and the amount of the seaman's expenses in returning to the port of shipment, less intermediate earnings, and others to the time the seaman returned to the port plus necessary expenses incurred, if any, and less intermediate wages." (1 Norris "Law of Seamen," 2nd Ed. § 481, p. 504.) (Emphasis supplied)

The case of *Alaska Steamship Company v. Gilbert,* (C.A. 9th) 236 Fed. 715, involved a seaman who was wrongfully discharged at Juneau, Alaska. The trial court had allowed him wages to the end of the voyage plus return fare to Seattle and reimbursement for his necessary stay at Juneau. This court affirmed that decision.

In *The Topgallant,* (DC Wash. 1898) 84 Fed. 356, the court stated by way of dictum at page 357:

> "If the captain discharges (the crew) before the termination of the voyage, without justifiable cause, they are entitled to wages *for the entire voyage,* and the amount of their expenses in returning to the port of discharge." (page 357)

A thorough research has disclosed no cases which apply any other measure of damages than the foregoing or something closely akin thereto.

(B) That Measure of Damages Is the Same as With a Seaman Who Takes Ill on a Voyage

The courts have applied the same measure of damages for the seaman who is wrongfully discharged and for the seaman who is taken ill on a voyage.

The case of *Aird v. United States,* (CA 3rd 1954) 216 F.2d 149, is a case in point. In that case the matter involved a war bonus for a seaman who was wrongfully discharged by the master. The lower court denied the war bonus by applying the same measure of damages as that applicable to the seaman injured on a voyage for reasons other than the unseaworthiness or negligence of the owner or his agents. On appeal, it was argued that a different rationale applied because of the fact that this case involved a breach of contract. The appellate court in affirming the action of the lower court stated that it could perceive no distinction between the two situations which would affect the measure of damage.

There are many more cases which discuss the defini-

tions of "voyage" and "season" with respect to seamen who are injured or taken ill in the course of a voyage than with respect to seamen who are wrongfully discharged. It seems that only a very few of the latter cases have gone to appellate courts. Hence we turn to the former cases for authority on this issue.

(C) The Case Authorities Define "Season" and "Voyage" on the Basis of the Period for Which the Seaman Is Hired

Most cases which discuss the question involve signed articles between the seaman and the ship owner. In some instances these articles are held to be ambiguous or incomplete. Nevertheless, the holdings in each case concur in one basic principle, namely, that *the seaman is not entitled to wages covering a period of time longer than that for which he signed up.*

In the landmark case of *Farrell v. United States,* 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850, a seaman signed articles which were considered to be ambiguous and which provided that he was to make a certain wartime journey out to sea and back to a final port of discharge in the United States for a term not to exceed twelve calendar months. The libelant contended that under the provision of those articles he was obligated to serve for twelve months. The U.S. Supreme Court, in affirming a lower judgment, rejected that argument, stating:

> "We think, in the light of the custom of the industry and the condition of the times, there is

nothing ambiguous about it and that it *obligated the petitioner* only for the voyage on which the ship was engaged when he signed on and that, when it terminated at a port of discharge in the United States, *he could not have been required to reimbark for a second voyage.* The twelve-month period appears as a limitation upon the duration of the voyage and not as a stated period of employment." (93 L.Ed, p. 857) (Emphasis supplied)

Thus that case establishes that it is the period for which the libelant is committed to serve that operates as the period used in determining the measure of damages.

The question of unearned wages was discussed in *Fish v. Richfield Oil Corporation,* (DC S.D. Calif. 1959) 178 F. Supp. 750. The court in that case, at pages 754-755, stated:

"The question of wages and overtime presents a problem that is not so clear. Concededly, where the employment is for a voyage or a definite period the maximum of recovery, if a seaman is incapacitated, would be the loss of wages for the voyage or the period of employment. Where the articles are of this character no difficulty is presented. Where, as here, the shipping articles are open articles in coastal trade, the problem must be solved by reference to general principles. And I believe that the correct solution is that indicated in one of the cases cited which limits recovery to the wage-payment period.

"As Fish's wages were paid monthly and the employment could be terminated at the end of any of the voyages, far short of a monthly period, the period of one month is fair and equitable to adopt. It accords with the principle which obtains generally in the law of contracts of employment that

> where no definite term is fixed, the periodic compensation, whether by the week or by the month, may be used to determine the duration of the employment. So, in this case I am of the view that while the contract was terminable by Fish or Richfield at the end of a voyage that could have lasted less than a month, *the contract was, in reality, a month to month contract terminable by either side at the end of any of the short voyages.*" (Italics supplied)

The term "voyage" as applied to a fishing vessel was considered in *Medina v. Erickson,* (CA 9th 1955) 226 F.2d 475. In that case the plaintiff's intestate signed articles, p. 478:

> "... for one or more trips ... and back to a final port of discharge in the United States for a term of time not exceeding twelve calendar months."

A union contract provided that in the event a crew member became ill, he was entitled to a full share for that particular trip only. Plaintiff's intestate argued that the twelve-month period referred to in the articles was a stated period of employment. This court (after specifically rejecting a consideration of the union contract) held that the twelve-month period was a limitation upon the duration of the voyage and not a stated period of employment. In so doing, it took note of evidence to the effect that there was a custom of the industry at the Port of San Diego that seamen, including engineers, by signing such articles engage themselves only for one voyage. The court went on to reverse a holding of the trial court awarding to the plaintiff's intestate a sum equal to the intestate's share of the

catch for a second and third trip of the vessel.

It is significant to note that the articles signed by the intestate in that case expressly referred to "one or more trips."

The duration of a fishing "season" was considered in two opinions of this court.

The first arose out of an appeal from the case of *Vitco v. Joncich,* (DC S.D. Calif. 1955) 130 F. Supp. 945. From the trial court's decision appear the following facts:

In the fall of 1951, libelant, who had shipped many years as a fisherman-cook, was approached by respondent to "fish tuna" with respondent during the ensuing "season." Libelant then signed written articles to fish "for a term of time not exceeding twelve calendar months.

A union contract provided:

> "For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next tuna season shall commence on July 1st, and end on the following December 31st" (p. 952).

Libelant fell ill in late January and left the vessel. The trial court held that he was entitled to his share of the catch for the second half as well as the first half of the year saying at page 952:

> "It was the practice for (respondent) to fish tuna 'all-year-around'. And when respondent Joncich proposed that libelant join the crew for the 1952 season, he mentioned 'next year'; he also mentioned

the possibility of libelant's share for the year being as much as $10,000.00; and libelant's last previous engagement with respondent had been for the full tuna season during an entire year.

"Although the provisions of the collective-bargaining agreement dividing the season are valid, the circumstances in evidence at bar, including the fact that the articles specify a maximum period of twelve months, require the finding that libelant *was in fact employed for the full tuna fishing season of the calendar year* (Citations)".

In affirming the decision this court in *Joncich v. Vitco,* (CA 9th 1956) 234 F.2d 161, was presented with an argument to the effect that libelant should only have been awarded a share of the catch for the first half of the year. It rejected the contention and accepted the opinion of the trial judge.

The significance of the case just referred to is found in a contrast between its facts and those in *Luksich v. Misetich,* (CA 9th 1944) 140 Fed.2d 812. The facts of the original conversation are set forth in the opinion as follows:

"At a casual meeting he had expressed his willingness to fish with Misetich [respondent]; at a subsequent meeting Misetich had told him when to report to the boat for work on the tuna nets. According to libelant's testimony he had asked whether the fishing spoken of was for tuna and sardines and had received an affirmative answer. Misetich denied having made any mention of sardines before the beginning of the tuna voyage to Mexican waters. *However, he admitted that at the beginning of the tuna season in March it was customary to take on fishermen for both the tuna sea-*

> *son and the sardine season that followed.*" (p. 813) (Italics supplied)

Subsequently, the parties executed signed articles for the contemplated voyage as one "to Mexican waters, Mexico, for one or more trips and return and such other ports and places in any part of the world as the Master may direct and back to a final port of discharge in the United States for a term of time not exceeding six calendar months" (p. 813).

Libelant suffered an injury in the course of the tuna voyage and contended that he was entitled to the share of the catch from both the tuna and sardine voyage. The trial court awarded him only damages for the tuna season. It based its holding on the shipping articles.

The court disagreed with the trial court and held that the shipping articles were not controlling because they were incomplete and oral evidence should have been admissible to supplement them. It affirmed the result arrived at by the trial court, however, with the words:

> "But a consideration of the evidence leads unerringly to the conclusion that at the time libelant embarked upon the voyage during which he was injured, his agreement with Misetich related to the tuna season only, the result reached by the district court." (p. 815)

Of very considerable significance is the fact that the lower court found that the conversation between libelant and respondent involved only the tuna fishing season, but *respondent admitted that at the beginning of the tuna season it was customary to take on fisher-*

men for both the tuna and sardine season that followed. The contrast between the *Luksich* case, *supra,* and the case of *Vitco v. Joncich, supra,* is evident. In the *Vitco* case, the court found that the libelant was in fact hired for the entire year and that the splitting of the season into two halves with one terminating on June 30th was an arbitrary division.

In the *Luksich* case, on the other hand, the court determined that although it was customary for persons to be taken on for both seasons, no express agreement was reached between the parties with respect to the later season.

The contrast between the two cases brings into clear focus the basic rule that a master is only liable to a seaman for wages to the end of the period for which he is actually employed.

(D) There Is No Evidence That Appellee Was Hired for More Than the 1963 Crab Fishing Season

There are two crab fishing seasons each year. One starts in the early summer and runs until the late autumn or winter. The other starts in the late winter and lasts until mid-spring. Between these seasons the vessel returns from Alaskan waters to Seattle. It does so again at the end of the spring season (Tr. 180-182). Appellant Petersen stated the situation very simply as follows:

"Q. Now, what do you term to be or consider to be the crab season?

"A. From June or July to November or December. That is one season.

> From January to April is the other season." (Tr. 317)

Appellee was hired in June to fish for "the coming crab fishing season" (Finding IV, R. 33).

There is not a shred of evidence that the oral contract of employment committed appellee to work on the boat the following spring (of 1964). To the contrary is appellee's version of the conversation:

> "Q. What was the discussion?
>
> "A. I asked Hendricks, Captain Hendricks, if there is a chance for me for the coming season, and Mr. Hendricks said 'Yes'." (Tr. 70)

When the boat returns to Seattle at the end of the fall season, a fisherman may leave the vessel or, if employment is offered to him, he may fish with the vessel during the following spring season. As appellant Petersen put it:

> "When they come down in November, the crew have the opportunity to quit or stay with the boat. That is between the crew and the skipper." (Tr. 23)

The facts here are strikingly similar to those in the case of *Vitco v. Joncich*, 130 F. Supp. 945, discussed in the previous subsection of this brief. There the trial court found that the libelant and respondent had discussed tuna season but not the sardine season, although the respondent conceded that many persons are hired for both. Inferentially, if libelant's work had been satisfactory, and he and the master had been compatible he would (but for his illness) have remained on the vessel during the sardine season. This did not mean, however,

that he was entitled to a share of the sardine catch.

Similarly, in the case at bar, there is undisputed evidence that if appellee's work had been satisfactory to the master and he had wished to stay on the vessel, he would probably have had an opportunity to do so during the following spring season.

However, there was never any contract for his services as a fisherman during the following spring season. Hence, under the case authorities cited above he is not entitled to Haugen's share of the catch for that season. It follows that Conclusion of Law II providing:

> "That as a direct and proximate result of respondent's breach and repudiation of the aforesaid contract, libelant sustained damages by way of lost earnings in the sum of $13,127.22." (R. 35),

is erroneous.

Technically Conclusion of Law II is erroneous even without reference to the transcript of the testimony in the case. Finding of Fact IV provides that libelant was employed as a fisherman "for the coming crab fishing season to commence shortly thereafter." (R. 2). The pretrial order defined that season by stating among the admitted facts the following:

> "The 1963 crab fishing season of the F. V. *Sea Star* lasted from June 22, 1963 to December 10, 1963." (R. 22)

Therefore, applying the rules of substantive law set forth in the preceding subsection of this brief, appellee should not be entitled to Haugen's share of the catch from the 1964 spring season.

(E) Evidence as to Haugen's Earnings in 1963 Season

Haugen's earnings on the "Sea Star" for the crab fishing season of 1963 came to $10,744.61 (R. 22). Appellee during the same period earned the sum of $1,644.31 from another source (R. 22). Subtracting the actual earnings of appellee from Haugen's earnings during that season leaves a difference of $9,100.30.

If this court determines there is to be any damage award and it determines not to reduce damages in accordance with the arguments set forth under Specifications 6 and 7 above, the damages should then be reduced to $9,100.30.

Specification 9

This specification reads as follows:

> The trial court erred in denying appellants' post trial motions to dismiss the cause or to reduce the awards in accordance with the contentions set forth in Specifications 7 and 8 above, or for a new trial.

Appellants' arguments in behalf of this specification have already been set forth in the preceding sections of this brief. They are incorporated by reference herein.

CONCLUSION

In consideration, appellants contend that the trial court erred in not dismissing the case. Under the evidence as to custom and as to alternative methods of communication (which was uncontradicted), four of the findings of the trial court were in error. The trial court should have concluded that on the basis of the custom

in the industry and the circumstances facing Hendricks, Hendricks acted reasonably in sending the message to Petersen in the manner that he did. Therefore Conclusion of Law I to the effect that appellants breached their contract, is erroneous. An important portion or covenant of the contract had already been breached by appellee when he stated that he would not come to Alaska until "later the following week."

In the alternative, appellants contend that the damage award was incorrect. Here appellants make two alternative arguments:

1. The trial court's determination that appellee would have remained on the vessel at least as long as Haugen did is both unsupported by the evidence and speculative. Hence the award (if there is to be an award at all) should have been $5,316.16.

2. Ordinary contract damages do not apply in the instance of a discharged seaman. He is entitled to wages to the end of the "season" for which he is hired. Under both the evidence and the trial court's findings, appellee was hired only for the 1963 season. Hence the award (if there is to be an award at all) should have been $9,100.30.

Respectfully submitted,

FERGUSON & BURDELL
By: W. WESSELHOEFT
Proctors for Appellants

APPENDIX RE EXHIBITS

Exhibit Number:	*Identified*	*Admitted*
Libelant's Exhibit 1	63	63
Libelant's Exhibit 2 (discussed page 86, and withdrawn page 87 as unmarked)		
Libelant's Exhibit 2	244	246
Respondents' Exhibit A-1	276	283
" " A-2	276	283
" " A-3	282 (See 283)	.....
" " A-4	320	400
" " A-5	379	381

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with these rules.

W. WESSELHOEFT
Proctor